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8 UNITED STATES DISTRICT COURT
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10 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 ABDIAZIZ HUSSEIN,

15 Defendant.
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Case No.: 13CR1514-JM

UNCLASSIFIED ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS
EVIDENCE OBTAINED PURSUANT TO THE
FISA WIRETAP

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18 **ORDER**

19 THIS MATTER is before the Court on Defendant's *Motion to*
20 *Suppress Evidence Obtained Pursuant to the FISA Wiretap*. For the
21 reasons set forth below, it is **ORDERED** that the Defendant's motion
22 is **DENIED**.

23 Background

24 On April 23, 2013, a federal grand jury sitting in this
25 district returned a four count indictment charging Abdiaziz Hussein
26 with one count of conspiracy to structure financial transactions,
27 in violation of 18 U.S.C. § 371, and three counts of structuring
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1 financial transactions for the purpose of evading recordkeeping
2 requirements, in violation of 31 U.S.C. § 5324(a)(3) (Docket No.
3 1).

4 On June 10, 2013, the Government provided Defendant with
5 notice pursuant to 50 U.S.C. § 1806(c) and 1825(d) that the United
6 States "intend[ed] to offer into evidence, or otherwise use or
7 disclose in any proceedings in this case information obtained or
8 derived from electronic surveillance or physical searches conducted
9 pursuant to the Foreign Intelligence Surveillance Act of 1978
10 (FISA), as amended, 50 U.S.C. § 1801 1811 and 1821-1829." (Docket
11 No. 9). On September 19, 2013, Defendant moved to compel the
12 Government to disclose, inter alia, whether any of the electronic
13 surveillance it intended to use at trial was obtained or derived
14 from surveillance authorized pursuant to Title VII of FISA ("the
15 FISA Amendments Act" or "FAA"), 50 U.S.C. §1881a et seq. (Docket
16 No. 26) ("Motion for Notice Pursuant to 50 U.S.C. §1881e(a)"). On
17 October 11, 2013, Defendant was informed that the Government
18 intends to offer into evidence or otherwise use or disclose
19 information obtained or derived only from electronic surveillance
20 pursuant to FISA. (Docket No. 30). On November 23, 2013, the
21 Court denied Defendant's Motion for Notice Pursuant to 50 U.S.C.
22 §1881e(a).
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25 Thereafter, on December 5, 2013, this matter came before the
26 Court on Defendant's *Motion to Suppress Evidence Obtained Pursuant*
27 *to the FISA Wiretap*. Defendant's motion seeks: (1) the "disclosure
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1 of the underlying applications for FISA warrants;" (2) the
2 suppression of "all interceptions made and electronic surveillance
3 conducted pursuant to [FISA];" and (3) "an evidentiary hearing on
4 the issues because the FISA surveillance was obtained and conducted
5 in violation of FISA and the First and Fourth Amendments to the
6 U.S. Constitution." (Docket No. 37). Although Defendant's motion
7 presents several arguments to support his contention that FISA-
8 acquired evidence in this case be suppressed, he presents two
9 primary arguments: (1) that access to FISA-related materials is
10 necessary to litigate suppression issues and is required in order
11 to conform with due process of law; and (2) that FISA-derived
12 evidence should be suppressed.
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14 In response to Defendant's motion, on February 7, 2014, the
15 Government filed: its *Classified Memorandum in Opposition to*
16 *Defendant's Motion to Suppress Evidence Obtained Pursuant to the*
17 *FISA Wiretap*; and a classified appendix, which includes the
18 applications, orders, and other materials relating to the
19 electronic surveillance (hereinafter, "FISA materials") , and other
20 classified submissions. (Docket No. 42). The Government also
21 filed an Unclassified version of its *Memorandum in Opposition to*
22 *Defendant's Motion to Suppress Evidence Obtained Pursuant to the*
23 *FISA Wiretap*. (Docket No. 45).
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25 Findings

26 To begin the FISA process, an application approved by the
27 Attorney General containing information that FISA requires is filed
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1 *ex parte* and under seal with the Foreign Intelligence Surveillance
2 Court ("FISC") (50 U.S.C. § 1804(a)). FISA requires that the FISC
3 make specific findings before entering an *ex parte* order, (50
4 U.S.C. § 1805(a)), which specifically identifies the targeted
5 facilities and directs how the surveillance is to be conducted. (50
6 U.S.C. § 1805(c)(1)-(2)). The Court has reviewed the Defendant's
7 motion and the Government's response and the classified appendix,
8 including the FISA materials. After a thorough *in camera, ex parte*
9 review and based on its analysis of all the materials submitted to
10 the Court, the Court finds that:

12 (1) Defendant Hussein has standing to bring this Motion to
13 Suppress as an aggrieved person, (50 U.S.C. § 1801(k));

14 (2) The President has authorized the United States Attorney
15 General to approve applications for electronic surveillance for
16 foreign intelligence information and purposes;

17 (3) Each application was made by a federal officer and
18 approved by the Attorney General, (50 U.S.C. § 1805(a)(1));

19 (4) Each application contained facts establishing probable
20 cause to believe that the target of the electronic surveillance was
21 at the time an agent of a foreign power, (50 U.S.C. §§ 1801(b)(2),
22 1805(a)(2)(A));

23 (5) No United States person was determined to be an agent of
24 a foreign power solely upon the basis of First Amendment protected
25 activities (50 U.S.C. § 1805(a)(2)(A));
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1 (6) Each application contained facts establishing probable
2 cause to believe that each of the facilities or places at which the
3 electronic surveillance was directed being used, or was about to be
4 used, by a foreign power or an agent of a foreign power, (50 U.S.C.
5 § 1805(a)(2)(B));

6 (7) The minimization procedures incorporated into the
7 application and orders met the requirements of 50 U.S.C. § 1801(h),
8 (50 U.S.C. § 1805(a)(3)), and the Government implemented such
9 minimization procedures accordingly;

10 (8) Each application contained all the statements and
11 certifications required by 50 U.S.C. § 1804, (50 U.S.C. §
12 1805(a)(4));

13 (9) No certification in an application for a target who was
14 at the time a United States person was clearly erroneous on the
15 basis of the statement made pursuant to 50 U.S.C. § 1804(a)(6)(E)
16 or any other information furnished under 50 U.S.C. § 1804(c), (50
17 U.S.C. § 1805(a)(4));

18 (10) A "significant purpose" of the Government's collection
19 pursuant to FISA was to collect foreign intelligence information,
20 (50 U.S.C. § 1804(a)(6)(B)), and the "significant purpose" standard
21 is constitutional under the Fourth Amendment. *See United States v.*
22 *Duka*, 671 F.3d 329, 343-345 (3d Cir. 2011).

23 (11) Each order issued by the FISC satisfied the requirements
24 of 50 U.S.C. § 1805(c);
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1 (12) Each order issued by the FISC satisfied the requirements
2 of 50 U.S.C. § 1805(d);

3 (13) Defendant made no preliminary showing of a knowing or
4 intentionally false statement (or one made with reckless disregard
5 for the truth) in the FISA applications that would entitle him to a
6 hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).
7 Moreover, there is no indication of any such false statements in
8 the FISA applications; thus, a Franks hearing is not warranted in
9 this matter;
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11 (14) Disclosure to the defense of the FISA materials is not
12 required pursuant to Section 1806(f) because the Court was able to
13 make an accurate determination of the legality of the electronic
14 surveillance without disclosing the FISA materials or any portions
15 thereof;
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17 (15) Due process does not otherwise require disclosure of the
18 FISA materials and the Government's submissions; and

19 (16) Because the Government does not intend to introduce or
20 otherwise use or disclose evidence obtained or derived from FAA
21 surveillance, (50 U.S.C. § 1881(a)), against the defendant in this
22 case, the defendant's motion to disclose the FISA materials and
23 suppress evidence on FAA-related grounds is moot.
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25 Discussion

26 Hussein seeks materials that were presented to the FISC,
27 including the resulting FISC orders, which provided the legal basis
28 for the electronic surveillance from which some of the evidence

1 that will be used against him was acquired. By requesting the
2 "disclosure of the underlying applications for FISA warrants,"
3 which calls for the disclosure of the FISA materials, Hussein is
4 seeking discovery of material that FISA specifically protects from
5 such disclosure, except as provided in 50 U.S.C. § 1806(f) and (g)
6 (*i.e.*, if disclosure is necessary for the Court to make a
7 determination of the legality of the surveillance, or if due
8 process requires discovery and disclosure).
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10 The Attorney General filed a declaration in this case stating
11 that disclosure of the FISA materials or an adversary hearing would
12 harm the national security of the United States. (Docket No. 42,
13 Sealed Exhibit 1). Therefore, as mandated by FISA, this Court
14 conducted an *in camera*, *ex parte* review of the FISA materials to
15 determine whether the information was lawfully acquired and whether
16 the electronic surveillance was conducted in conformity with an
17 order of authorization or approval (*i.e.*, lawfully conducted).
18 This *in camera*, *ex parte* review process under FISA satisfies due
19 process under the United States Constitution. See, e.g., *United*
20 *States v. El-Mezain*, 664 F.3d 467, 567 (5th Cir. 2011); *United*
21 *States v. Abu-Jihaad*, 630 F.3d 102, 117 (2d Cir. 2010); *United*
22 *States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005); *United States*
23 *v. Butenko*, 494 F.2d 593, 607 (3d Cir. 1974); *United States v.*
24 *Warsame*, 547 F. Supp. 2d 982, 988-89 (D. Minn. 2008); *United States*
25 *v. Spanjol*, 720 F. Supp. 55, 58-59 (E.D. Pa 1989). In conducting
26 that review, the Court may disclose the FISA materials "only where
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1 such disclosure is necessary to make an accurate determination of
2 the legality of the surveillance [or search]." 50 U.S.C. § 1806(f).

3 After conducting its own review of the FISA materials, the
4 Court finds that it does not require the assistance of the defense
5 to make an accurate determination of the legality of the electronic
6 surveillance. Thus, there is no basis for disclosure of any of the
7 FISA materials to Hussein. *See United States v. Duggan*, 743 F.2d
8 59, 78 (2d Cir. 1984) (holding that disclosure should occur only if
9 the court determines such disclosure is necessary to make an
10 accurate determination of the legality of the surveillance).

12 As a result of the Court's thorough *in camera*, *ex parte*
13 examination of the Government's classified memorandum, the FISA
14 materials and other materials contained in the Government's
15 classified appendix, the Court finds it has all the information
16 needed to address Defendant's motion to suppress. The Court finds
17 that the Government satisfied FISA's requirements to obtain orders
18 for electronic surveillance; that the information obtained
19 pursuant to FISA was lawfully acquired; and that the electronic
20 surveillance was conducted in conformity with an order of
21 authorization or approval.

23 Additionally, there is no basis for disclosure of the FISA
24 materials pursuant to 50 U.S.C. § 1806(g). Such disclosure is only
25 permitted if this Court's *ex parte*, *in camera* review disclosed that
26 due process requires discovery or disclosure. The Court finds that
27 due process does not require disclosure of the FISA materials or
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1 other materials in the Government's classified appendix to the
2 defendant.

3 Although federal courts are not in agreement as to whether the
4 FISC's probable cause determinations regarding material presented
5 in the FISA applications should be reviewed *de novo* or accorded due
6 deference, the materials under review here pass muster under either
7 standard. As all other courts before it have found and uniformly
8 held, the Court finds that the probable cause requirement of FISA
9 comports with the requirements of the Fourth Amendment to the
10 United States Constitution. See, e.g., *El-Mezain*, 664 F.3d at 568-
11 70; *Abu-Jihaad*, 630 F.3d at 117-119; *United States v. Isa*, 923 F.2d
12 1300, 1304 (8th Cir. 1991).

14 Furthermore, certifications submitted in support of a FISA
15 application should be "subjected only to minimal scrutiny by the
16 courts," *United States v. Badia*, 827 F.2d 1458, 1463 (11th Cir.
17 1987), and are "presumed valid." *Duggan*, 743 F.2d at 77 & n.6
18 (citing *Franks*, 438 U.S. at 171); *United States v. Campa*, 529 F.3d
19 980, 993 (11th Cir. 2008); *United States v. Sherifi*, 793 F. Supp.
20 2d 751, 760 (E.D. N.C. 2011) ("a presumption of validity [is]
21 accorded to the certifications"); *United States v. Nicholson*, No.
22 09-CR-40 BR, 2010 WL 1641167, at *5 (D. Or. Apr. 21, 2010) (quoting
23 *United States v. Rosen*, 447 F. Supp. 2d 538, 545 (E.D. Va. 2006));
24 *Warsame*, 547 F. Supp. 2d at 990 ("a presumption of validity [is]
25 accorded to the certifications"). If the target is a United States
26 person, then the district court should also ensure that each
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1 certification is not "clearly erroneous." *Campa*, 529 F.3d at 994;
2 *Duggan*, 743 F.2d at 77; *United States v. Kashmiri*, 2010 WL 4705159,
3 at *2 (N.D. Ill., Nov. 10, 2010). A certification is clearly
4 erroneous only when "the reviewing court on the [basis of the]
5 entire evidence is left with the definite and firm conviction that
6 a mistake has been committed." *United States v. U.S. Gypsum Co.*,
7 333 U.S. 364, 395 (1948); see *United States v. Garcia*, 413 F.3d
8 201, 222 (2d Cir. 2005); *United States v. Islamic American*
9 *Relief Agency ("IARA")*, No. 07 00087-CR-W-NKL, 2009 WL 5169536, at
10 *4 (W.D. Mo. Dec. 21, 2009). Applying these standards, this Court
11 finds that the certifications were made in accordance with FISA's
12 requirements.
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14 The Defendant also seeks an adversarial hearing pursuant to
15 *Franks v. Delaware*, 438 U.S. 154 (1978). A defendant is entitled to
16 such a hearing only where he has made "a substantial preliminary
17 showing that a false statement knowingly and intentionally, or with
18 reckless disregard for the truth, was included" in the FISA
19 materials and that the allegedly false statement was necessary to
20 the FISC's approval of the application. *Id.* at 155-56. The
21 Defendant has made no such substantial preliminary showing here,
22 and therefore, Defendant is not entitled to a *Franks* hearing. The
23 Court is aware that Defendant has been unable to review the FISA
24 materials. Therefore, the Court has made an independent review of
25 all the materials and has determined that there is no indication of
26 any false statements having been included in the FISA materials.
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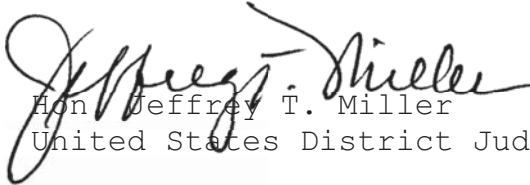
Conclusion

For all of the foregoing reasons, IT IS HEREBY ORDERED that the Defendant's motion is DENIED; and

IT IS FURTHER ORDERED that the Government's Classified Memorandum and classified appendix, including the FISA materials, are SEALED and shall be retained in accordance with established security procedures by the Classified Information Security Officer or his/her designee.

IT IS SO ORDERED.

DATED: April 29, 2014


Hon. Jeffrey T. Miller
United States District Judge